Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1016

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1979. A petition for rehearing was denied on November 28, 1979. The petition for a writ of certiorari was filed on December 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal jurisdiction was impermissibly contrived by government agents.

2. Whether venue was proper in the Northern District of New York.

3. Whether evidence of prior acts of misconduct by petitioner was improperly admitted.

STATEMENT

After a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of receiving and selling goods stolen from foreign commerce, in violation of 18 U.S.C. 2315, conspiracy to commit that offense, in violation of 18 U.S.C. 371, and aiding and abetting the interstate transportation of stolen goods, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-2a).

The evidence at trial showed that on December 6, 1977, Agent Donald Stenham of the Federal Bureau of Investigation, posing as a person from upstate New York interested in purchasing stolen goods, met with petitioner and co-defendant Anthony DePasque in New York City to discuss possible future transactions in stolen property (Tr. 56-59, 115-116). Petitioner stated that he or DePasque would deal directly with Stenham and that Stenham could expect lower prices for that reason (Tr. 57, 59, 117).

On March 9, 1978, a load of stoneware shipped from Japan was delivered to Jepcor International, Inc., in Edison, New Jersey (Tr. 14-18). The delivery trailer was

[1]Before petitioner's trial, co-defendant Anthony DePasque pleaded guilty to the interstate transportation count of the indictment, and co-defendant Matty Vicaro pleaded guilty to the conspiracy count.

parked in the Jepcor plant's dock area. On March 13, 1978, before the stoneware was unloaded, Jepcor employees reported that the trailer and its contents had been stolen (Tr. 13-16, 23-26).

A few days later, Stenham received several telephone calls in Syracuse, New York from DePasque in New Jersey (Tr. 117-118, 122-125). DePasque offered to sell 1000 cases of stolen stoneware at $25 per case. He stated that the goods should be transported and sold outside New Jersey to avoid detection (Tr. 118, 113-124, 126, 131-132). Stenham agreed to resell the goods in upstate New York (Gov. Exhs. 5, 6).[2]

On March 20, 1978, DePasque instructed Stenham to bring a 40-foot tractor-trailer to New Jersey to pick up the stoneware and transport it to New York (Tr. 124). Two days later, Stenham, undercover FBI agent Richard Dorton, and an informant drove to Clifton, New Jersey, as instructed. They met petitioner, DePasque, and co-defendant Matty Vicaro at a diner (Tr. 33, 137, 214-215). DePasque displayed a brochure describing the stoneware, and petitioner stated that Stenham would receive 900 cases of the merchandise (Tr. 34). After DePasque displayed samples of the stoneware, petitioner said that the purchase price for the goods was $25 per case (Tr. 36-37). In petitioner's presence, Stenham told DePasque that the stoneware would be taken to Syracuse (Tr. 249-250).

Later the same day, DePasque informed Stenham that 880 cases of stoneware had been loaded onto Stenham's tractor-trailer (Tr. 181-182). After further discussion with petitioner and DePasque concerning the price, Stenham

[2]Stenham's telephone conversations with DePasque were tape recorded, and the recordings were played at trial.

agreed to pay $19,000 for the goods plus a commission for DePasque's and petitioner's efforts in negotiating the transaction (Tr. 181-182, 260). Stenham paid DePasque $22,000 in cash (Tr. 183-184). DePasque gave Stenham directions identifying the most direct route back to Syracuse, and the agents drove the tractor-trailer directly to that city (Tr. 184).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that his offenses were purely local in nature and that federal jurisdiction was contrived by government agents who transported the stolen goods in interstate commerce. The argument is without merit.

In the first place, proof of movement of the goods by federal agents was unnecessary for petitioner's conviction on two of the three counts with which he was charged. The first count of the indictment charged petitioner with receiving and selling stolen goods moving in interstate or foreign commerce; the third count charged him with conspiracy to commit that offense. The jurisdictional requirement that the goods be part of "interstate or foreign commerce" was satisfied by proof that the stoneware had been shipped from Japan to New Jersey and was stolen before being unloaded from a trailer parked in the shipping dock area of the company scheduled to receive the goods. See *United States* v. *Wills*, 593 F. 2d 285 (7th Cir.), cert. denied, 441 U.S. 964 (1979); *United States* v. *Williams*, 545 F. 2d 1036, 1039 (6th Cir. 1976); *United States* v. *Astolas*, 487 F. 2d 275 (2d Cir. 1973), cert. denied, 416 U.S. 955 (1974).

The second count of the indictment charged petitioner with the interstate transportation of stolen goods from Clifton, New Jersey to Syracuse, New York. Although FBI agents actually transported the stoneware across state lines, petitioner was fully responsible for the interstate shipment. The agents did not take the merchandise to New York in order to contrive a basis for federal jurisdiction; they did so, at DePasque's behest and with petitioner's knowledge, in a supposed effort to avoid detection of the illegal scheme. DePasque called Agent Stenham in Syracuse for two reasons: he and his associates wanted to sell the stolen stoneware, and they wanted to sell it to someone who they were confident would remove the merchandise from New Jersey before reselling it. DePasque insisted on the interstate transportation and provided Stenham with directions for returning to Syracuse (Tr. 184). Petitioner knew about this aspect of the transaction and approved it (Tr. 249-250). In short, movement of the stoneware in interstate commerce after the sale to Stenham was not merely foreseeable; as far as petitioner and his partner were concerned, it was a condition of their agreement with the undercover FBI agent.

Under these circumstances, there was no impropriety in the FBI agents' conduct. The agents merely afforded petitioner an opportunity to commit the offense he intended to commit from the outset. Federal jurisdiction was not artificially created with respect to Count II, and petitioner therefore is not entitled to relief. See *United States* v. *Corcione*, 592 F. 2d 111, 115-116 (2d Cir.), cert. denied, 440 U.S. 975, 985 (1979); *United States* v. *Santoni*, 585 F. 2d 667, 671 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979); *United States* v. *Herrera*, 584 F. 2d 1137, 1145-1146 (2d Cir. 1978); *United States* v. *Gambino*, 566 F. 2d 414, 418 (2d Cir. 1977), cert. denied, 435 U.S.

952 (1978); *United States* v. *Hall*, 536 F. 2d 313, 327 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Gardner*, 516 F. 2d 334, 344-345 (7th Cir), cert. denied, 423 U.S. 861 (1975).[3]

Petitioner's reliance on *United States* v. *Archer*, 486 F. 2d 670 (2d Cir. 1973), is misplaced. In *Archer*, the court of appeals reversed a conviction under the Travel Act, 18 U.S.C. 1952 (proscribing the use of interstate facilities in the commission of certain unlawful acts), because the only proven connection with interstate commerce consisted of interstate telephone calls initiated by government agents solely for the purpose of establishing federal jurisdiction. Here, by contrast, petitioner and his co-defendant initiated and encouraged the interstate transportation of the stolen goods.

2. Petitioner next asserts (Pet. 7-8) that venue was improper in the Northern District of New York. We disagree. The conspiracy count in the indictment alleged overt acts occurring in the Northern District of New York, namely, DePasque's calls to Agent Stenham in Syracuse. The proof at trial showed that DePasque

[3]In any event, review of petitioner's conviction on Count II alone is not necessary. Petitioner received concurrent sentences on all three counts. Because petitioner's jurisdictional objection is plainly unavailing with respect to Counts I and III, the Court need not consider the primarily factual question whether petitioner's involvement in the movement of the stoneware from New Jersey to New York was sufficient to support the interstate transportation conviction. See *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). The latter conviction would not have independent collateral consequences apart from the convictions on Counts I and III, and it would not affect the amount of time petitioner must serve before becoming eligible for parole under the United States Parole Commission's guidelines (28 C.F.R. 2.20). Compare *Rubin* v. *United States*, 439 U.S. 810 (1978).

negotiated the sale of the stolen goods through these telephone calls. This evidence established a sufficient relationship with the Northern District of New York to fix venue there. *Hyde* v. *United States*, 225 U.S. 347 (1912); *United States* v. *Strickland*, 493 F. 2d 182, 187 (5th Cir.), cert. dismissed, 419 U.S. 801 (1974).

Moreover, the interstate transportation offense was continuing in nature.[4] Under 18 U.S.C. 3237(a), such an offense may be prosecuted "in any district in which [the] offense was begun, continued, or completed." Trial in the Northern District of New York was proper under this standard. See *United States* v. *Hankish*, 502 F. 2d 71, 73 (4th Cir. 1974); *United States* v. *DeKunchak*, 467 F. 2d 432, 436 (2d Cir. 1972). Petitioner has not demonstrated or even suggested that he suffered any unfairness or hardship because he was prosecuted in a federal district outside New Jersey. Cf. *United States* v. *Cores*, 356 U.S. 405, 407 (1958).

3. Finally, petitioner argues (Pet. 8), relying on his brief in the court of appeals, that evidence of prior criminal acts was improperly admitted at trial. The evidence at issue showed that on December 6, 1977, FBI Agents Stenham and Dorton met with co-defendant DePasque and discussed possible transactions in stolen merchandise. DePasque said that they would discuss the matter further that evening and that the agents would meet his partner at that time (Tr. 56). DePasque later introduced the agents to petitioner. Petitioner assured the

[4]As an aider and abettor, petitioner could, of course, be tried wherever the substantive crime was committed. *United States* v. *Buttorff*, 572 F. 2d 619, 627 (8th Cir.), cert. denied, 437 U.S. 906 (1978); *United States* v. *Kilpatrick*, 458 F. 2d 864, 867-868 (7th Cir. 1972).

agents that they would deal directly with him and would therefore receive a lower price on goods purchased (Tr. 57-59).

Petitioner complains that the December 6, 1977 conversations occurred three months before the dates of the conspiracy alleged in the indictment and that the evidence of those conversations should have been excluded as an impermissible showing of prior criminal acts. But the evidence established the background and nature of the criminal scheme that came to fruition in March 1978 and formed the basis of the indictment against petitioner. It was admissible under Fed. R. Evid. 404(b) to show the preparation and planning of the offenses with which petitioner was charged. *United States* v. *Testa*, 548 F. 2d 847, 851-852 (9th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1980

DOJ-1980-03